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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LEAP WIRELESS INTERNATIONAL, INC., et al., Plaintiffs and Appellants, v. ENDESA, S.A., Defendant and Respondent.	D039484 (Super. Ct. No. GIC769900)

APPEAL from a judgment of the Superior Court of San Diego County, Raymond Zvetina, Judge. Affirmed.

Plaintiffs Leap Wireless International, Inc. (Leap) and Inversiones Leap Wireless, S.A. (Inversiones; together plaintiffs) appeal a judgment of dismissal entered after the trial court granted the motion of Endesa, S.A. for an order quashing service of summons based upon the lack of personal jurisdiction. We hold the evidence before the trial court of Endesa's contacts with California was insufficient to establish personal jurisdiction. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Inversiones, a Chilean corporation, is a wholly owned subsidiary of Leap, a Delaware corporation that has its principal place of business in San Diego, California. Inversiones owns Smartcom, S.A., a Chilean corporation providing public digital mobile telecommunications services in Chile. Endesa is a Spanish corporation in the electrical business; it recently diversified to include telecommunications and other operations in Latin America.

In March 2000 Endesa learned that Leap had retained ABN Amro Bank in Chile to locate one or more buyers for Smartcom. (All relevant dates are in 2000 except as otherwise specified.) Endesa met with Smartcom representatives in Chile to learn more about Smartcom's operations and Leap's plans for outside investors. At that meeting Endesa agreed to meet with Leap representatives in San Diego to discuss its interest in Smartcom and other business opportunities in Latin America. In April, Endesa sent Leap a written proposal suggesting to purchase an interest in Smartcom, which the parties discussed at a San Diego meeting about a week later.

After the meeting Leap received an e-mail from Endesa indicating its desire to discuss several alternative proposals. Endesa sent a "Telefax" to Leap proposing a meeting to draft an agreement; the parties then met in New York City and signed a Memorandum of Understanding (MOU) regarding the Smartcom acquisition. The MOU set forth the parties' understanding that Endesa would purchase Smartcom, but except for the provisions regarding "Exclusivity" and "Confidentiality," the MOU was not legally binding.

In May, Endesa conducted due diligence at the Smartcom offices in Chile and negotiated the sale with Leap for over a week. The following month plaintiffs and Endesa signed a Share Purchase Agreement (the Agreement) in Chile. The Agreement provided that Endesa would purchase Smartcom from Inversiones for $300 million, with the formal closing to occur in Chile. Endesa paid a portion of the consideration with a Non-negotiable Note (the Note), executed in Chile, that called for the principal and interest to be paid to Inversiones in Chile. The Note provided that to the extent Endesa has "asserted a good faith claim for indemnification" under the Agreement, it could withhold payment until the claim is resolved.

In May 2001, Endesa withheld payment under the Note, claiming that it was entitled to indemnification because plaintiffs breached certain portions of the Agreement. The following month it filed suit against plaintiffs in Chile seeking a declaration regarding its rights and obligations under the Note and the Agreement. That same day, plaintiffs filed the instant lawsuit and another action in New York against Endesa. Both complaints allege that Endesa breached the Agreement by seeking indemnification in bad faith and as a result of this breach, Endesa owes Inversiones the amounts due under the Note.

In this action, Endesa moved for an order quashing service of summons due to improper service and on the grounds the California court lacks personal jurisdiction over it. It also sought an order dismissing or staying the action because California was an inconvenient forum. In support of the motion Endesa submitted evidence that it does not do business, own property or advertise within California. It contends the April meeting in

California did not involve any negotiations and was simply to gather information about Smartcom.

In opposition to the motion, plaintiffs presented the declarations of three representatives who indicated the April meeting was the beginning of negotiations for the Smartcom sale. They also cited Endesa's telephone calls and correspondence via mail, e-mail and "Telefax" to Leap in California, as well as Smartcom's visits to San Diego to meet with Ericsson representatives regarding equipment Ericsson installed for Smartcom. Plaintiffs presented evidence showing that Endesa is listed on the New York Stock Exchange, maintains an Internet website with an English language choice and owns interests in two foreign companies that own interests in two California businesses. Plaintiffs also requested jurisdictional discovery in the event the court determined they had presented insufficient facts to establish jurisdiction in California.

The trial court granted the motion to quash service of summons, concluding plaintiffs failed to meet their burden of establishing that Endesa availed itself of the laws and benefits of California. It also declined to rule on the evidentiary objections presented by the parties, denied plaintiffs' request to conduct discovery and indicated it would not entertain oral argument. Plaintiffs appeal from the resulting dismissal.

DISCUSSION

Jurisdictional Requirements and Standard of Review

A state's exercise of personal jurisdiction over a nonresident defendant may be either "general" or "specific." (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445-446 (*Vons Companies*).) General jurisdiction exists if the defendant's

contacts "'in the forum state are "substantial . . . continuous and systematic.' [Citations.]" (*Ibid*.) Plaintiffs did not argue general jurisdiction existed and the trial court properly concluded the motion hinged on the existence of specific jurisdiction. Specific jurisdiction exists where the defendant has purposefully availed itself of forum benefits with respect to the matter in controversy, the controversy is related to or arises out of the defendant's contacts with the forum and the assertion of jurisdiction would comport with fair play and substantial justice. (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 536.) The relationship between this litigation, the nonresident defendant and California must be examined to determine whether specific jurisdiction exists. (*Dunne v. State of Florida* (1992) 6 Cal.App.4th 1340, 1344.) Where a contract is alleged to form the basis for personal jurisdiction, "a court must evaluate the contract terms and the surrounding circumstances to determine whether the defendant purposefully established minimum contacts within the forum. Relevant factors include prior negotiations, contemplated future consequences, the parties' course of dealings, and the contract's choice-of-law provision. [Citation.]" (*Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 907.)

On a motion to quash service of summons, the plaintiff bears the burden of proving by a preponderance of the evidence that all jurisdictional criteria are met. (*Mihlon v. Superior Court* (1985) 169 Cal.App.3d 703, 710 (*Mihlon*); *Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1232 (*Ziller*).) The burden must be satisfied by competent evidence in affidavits and authenticated documents. (*Ziller*, *supra*, 206 Cal.App.3d at p. 1233.) Although an unverified complaint may not be considered as

supplying the necessary facts, it is relevant in defining the causes of action asserted, and determining whether they arise out of the nonresident's alleged local activities. (*Mihlon*, *supra*, 169 Cal.App.3d at p. 710.) Where there is conflicting evidence, we review the trial court's factual determinations under the substantial evidence standard (*Vons Companies*, *supra*, 14 Cal.4th at p. 449) and resolve all conflicts "against the appellant and in support of the order." (*Wolfe v. City of Alexandria* (1990) 217 Cal.App.3d 541, 546.) When there is no conflict in the evidence, the question of jurisdiction is one of law, which we review de novo. (*Vons Companies*, *supra*, 14 Cal.4th at p. 449.)

Plaintiffs Failed to Show Existence of Specific Jurisdiction

Plaintiffs contend Endesa had sufficient contacts with California such that personal jurisdiction existed over it. We begin by reviewing the causes of action asserted and plaintiffs' evidence presented in opposition to the motion, to determine whether the causes of action arose out of Endesa's alleged activities in California. (*Mihlon*, *supra*, 169 Cal.App.3d at p. 710.) Because the trial court did not rule on the written evidentiary objections presented by Endesa, the objections are deemed waived on appeal and we consider all the evidence presented by plaintiffs. (*DVI, Inc. v. Superior Court* (2002) 104 Cal.App.4th 1080, 1100.) All of Endesa's evidence is before us for the same reason.

Plaintiffs allege that Endesa breached the Agreement by seeking indemnification in bad faith and as a result of this breach, Endesa owes Inversiones the amounts due under the Note. Although plaintiffs attached the Agreement and Note as exhibits to their complaint, they presented no evidence regarding the negotiation and execution of these documents. Endesa's evidence shows that both documents were executed in Chile. The

documents themselves show Endesa (a Spanish company) agreed to purchase Smartcom (a Chilean company) from Inversiones (a Chilean company). Under the Note, Endesa agreed to pay to Inversiones, in Chile, a certain sum in accordance with the Agreement. The Agreement provided that the sale would close in Chile and both documents are governed by Delaware law.

Significantly, plaintiffs do not dispute Endesa's showing that the Agreement and Note were not consummated in California and that Endesa conducts no business in California. Rather, plaintiffs argue that the parties "negotiated" the Agreement during the April meeting, and that this, viewed in connection with Endesa's correspondence and telephone calls to California, is sufficient for the assertion of jurisdiction. The trial court disagreed, concluding the April meeting was "preliminary" to the execution of the contracts at issue and that it constituted a mere "'foot-fall'" within California. Substantial evidence supports the trial court's finding.

Although the declarations presented by plaintiffs described the meeting as "negotiations" leading to the Smartcom sale, they provided no details of the purported negotiations. The handwritten notes of two individuals taken during the meeting include none of the details contained in the MOU, Agreement or Note.

In contrast, Endesa's evidence was that the April meeting lasted a few hours, for the purpose of "mutual information-gathering." An e-mail sent by Endesa to Leap after the meeting indicated the parties discussed the "Smartcom operation" and plaintiffs' concerns about losing control of Smartcom and creating a negative perception in the market. The author of the e-mail confirmed that no negotiations took place at the meeting, which he

attended, and that the purpose of the meeting was to gather information about the companies. An e-mail send by Leap to Endesa two days after the meeting similarly shows the parties did not negotiate a particular agreement because it suggested four alternative business arrangements.

The result does not change when Endesa's telephone calls and correspondence to Leap in California are added to the analysis. These contacts occurred immediately before and after the April meeting when the parties were contemplating a possible future agreement. Plaintiffs did not present sufficient evidence showing the contracts at issue are related to or arose out of these preliminary communications. (*Vons Companies*, *supra*, 14 Cal.4th at p. 448.) Moreover, the nature and quality of these contacts are too attenuated for Endesa to reasonably anticipate being hailed into court here for contracts executed in Chile related to the sale of a Chilean company. (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269.)

Endesa's other alleged contacts with California are unrelated to the contracts at issue and are insufficient to show Endesa purposefully availed itself of the privilege of conducting activities within California, thus invoking the benefits and protections of its laws. (See *Vons Companies*, *supra*, 14 Cal.4th at p. 446.) While Endesa maintains a web site with an English language choice, plaintiffs presented no evidence showing Endesa targeted California or solicited business via the site. (*Jewish Defense Organization, Inc. v. Superior Court* (1999) 72 Cal.App.4th 1045, 1060 [maintaining passive web site accessible from forum insufficient basis for exercising jurisdiction].) Similarly, plaintiffs failed to show how Endesa's listing on the New York Stock Exchange relates to their claims in this action. (*Doe v. Unocal Corp.* (9th Cir. 2001) 248 F.3d 915, 922 [listing and sale of stock

insufficient to establish personal jurisdiction because claims were unrelated to these contacts].) Although Endesa admits having an investor interest in two foreign companies that in turn own an interest in two companies doing business in California, the actions of these foreign companies cannot be attributed to Endesa. (*Sonora Diamond Corp. v. Superior Court*, *supra*, 83 Cal.App.4th at p. 540.) Post-sale meetings between Smartcom representatives and Ericsson in California are similarly not attributable to Endesa. (*Ibid*.)

Finally, plaintiffs contend that Endesa's failure to pay the Note impacts Leap in California because Inversiones, the Note payee, is its wholly owned subsidiary. But simply asserting Endesa knew or should have known that its acts or omissions would cause harm to Leap in California is not enough to establish jurisdiction. (*Pavlovich v. Superior Court*, *supra*, 29 Cal.4th at pp. 270-271.) Rather, "additional evidence of express aiming or intentional targeting" is required to establish jurisdiction under the effects test. (*Id*. at pp. 272-273.) Plaintiffs produced no evidence supporting this requirement.

The Trial Court Did Not Abuse Its Discretion

Plaintiffs contend the trial court abused its discretion by denying its request for discovery. We find no abuse of discretion on this record. Plaintiffs submitted a request for jurisdictional discovery with its opposition papers, asking for the opportunity to undertake discovery should the trial court determine it presented insufficient facts justifying jurisdiction in California. Plaintiffs did not indicate what type of discovery they contemplated, nor did they indicate further discovery was likely to produce evidence of additional California contacts by Endesa relating to this transaction. Based on this showing, we cannot say the trial court abused its discretion by concluding that further

discovery was unnecessary. Although plaintiffs contend on appeal that it needed the discovery to respond to the additional evidence submitted by Endesa with its reply papers, this argument fails to recognize that they bore the initial burden of presenting evidence showing that all jurisdictional criteria were met. (*Mihlon*, *supra*, 169 Cal.App.3d at p. 710.) Moreover, plaintiffs again failed to articulate on appeal what facts they may have located through additional discovery.

Plaintiffs also argue the trial court erred in denying oral argument because it denied them the opportunity to address the new evidence submitted with Endesa's reply. Specifically, plaintiffs contend the reply declarations contained new argument and provided Endesa's "spin" on new documents.

A trial court generally has discretion to hear oral argument on law and motion matters. (See *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1248-1249.) Plaintiffs presented no authority showing oral argument is required on a motion to quash and Code of Civil Procedure section 418.10, governing such motions, does not indicate a "hearing" is required. While statutory reference to the terms "hearing" and "hear" do not necessarily encompass oral argument unless the context or other language indicates a contrary intent (*Lewis v. Superior Court*, *supra*, 19 Cal.4th at p. 1247), at least one court has determined that "[p]arties are . . . entitled to oral argument in 'critical pretrial matters' where there is a 'real and genuine dispute.' [Citations.]" (*Medix Ambulance Service, Inc. v. Superior Court* (2002) 97 Cal.App.4th 109, 114.)

We need not decide whether oral argument is required for the instant motion, because even assuming the trial court erred, plaintiffs have not shown that the error was

prejudicial. (*Mediterranean Construction Co. v. State Farm Fire & Casualty Co.* (1998) 66 Cal.App.4th 257, 267.) As addressed above, plaintiffs had the initial burden of demonstrating facts justifying the exercise of jurisdiction, and except where the parties presented conflicting evidence, our review is de novo. (*Vons Companies*, *supra*, 14 Cal.4th at p. 449.) After an independent review of the evidence we hold that plaintiffs failed to meet their initial burden on this motion, thus we find no prejudicial error because nothing further could have been added by argument.

DISPOSITION

The judgment is affirmed. Endesa is to recover its costs on appeal.

McINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.